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IN THE

Supreme Court of the United States

October Term, 1963

No. 623

FRED S. CALHOON, *et al.*,

Petitioners,

—*v.*—

A. C. LATHER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

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BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

Questions Presented

Whether the Atlanta Plan of desegregating the public schools, approved by both the District Court (217 F. Supp. 614) and Court of Appeals below (321 F. 2d 302), is constitutionally defective (1) In its basic approach to achieving desegregation, through application of assignment procedures now based solely on considerations of choice, space and proximity, on a grade-a-year basis, commencing with the high school grades and proceeding downward, (2) Insofar as it contemplates that the transition will be achieved over an eleven-year period, and (3) For the reason that the plan

presently contains no definite provisions for allocation of teachers and other personnel on a non-racial basis, the courts below having held these matters in abeyance pending development of further progress under the plan.

Interest of the State of Georgia

Prior to 1961, the official policy of the State of Georgia was one of unqualified opposition to desegregation of public education in any form. Existing statutes provided for the cutting off of all public funds to desegregated schools.[1] Practically all candidates for state office were elected on a pledge to defend segregation. In early 1961, however, state laws purporting to cut off funds to the University System in the event of desegregation, identical in terms to those applicable to the common schools, were held invalid by the United States District Court for the Middle District of Georgia in a suit involving the University of Georgia. See *Holmes* v. *Danner*, 191 F. Supp. 394 (D. C. Ga. 1961).

In a historic, unprecedented move, Governor Ernest Vandiver addressed the General Assembly which was then in session, urging the repeal of all state laws requiring segregation in the common schools. This was done [2], thereby enabling the desegregation of the Atlanta schools to proceed in September without the spectacle of a state-federal conflict similar to that experienced in other states.

We would be less than candid should we fail to dispel the inference that the state thereby suddenly reversed its policy

[1] Ga. Laws 1955, p. 174; Ga. Laws 1956, p. 6; Ga. Laws 1959, p. 15; Id., p. 157, as amended, Ga. Laws 1960, p. 147. All General Appropriations Acts, beginning in 1951 (Ga. Laws 1951, p. 417) and continuing through the Act of 1956 (Ga. Laws 1956, pp. 753, 758), which remained in effect (Constitution of Georgia, Art. VII, Sec. IX, Par. II) until passage of a new Act in 1961 (Ga. Laws 1961, p. 356), contained similar cut-off provisions.

[2] Ga. Laws 1961, pp. 35, 37.

of segregation in exchange for one of zealous pursuit of integration. But the undisputed fact is that the 1961 session of the General Assembly did reflect a distinct change in attitude. Respect for law and order, obedience to the Supreme Law—notwithstanding disagreement therewith—and a determination to permit each political subdivision to solve its problems in accordance with local conditions, then and now, represent the official thinking of all branches of the state government.

In keeping with this new approach, Atlanta has and is now making its constitutional obligations with a fidelity which has won universal acclaim and respect. It should be permitted to continue in the same manner. Granted that the degree of desegregation may not have reached that desired by plaintiffs, it is too early to condemn it as too "deliberate" and lacking sufficient "speed," particularly since the first of [3] the two steps producing the greatest impact is shortly to be achieved in September, 1964, when the plan reaches the eighth grade, requiring for the first time reassignment initially of all pupils entering the eighth grade according to the limited criteria now retained in the plan.

The Atlanta Plan should be permitted to run its course. Certainly it should not be replaced before receiving its most crucial test in September, 1964. The State of Georgia feels a vital interest in assuring that the myriad problems of its political subdivisions be handled by local officials with solutions locally derived. Self-determination thus manifested projects the doctrine of States Rights on its highest plane.

[3] The second major step will occur when the plan reaches the first grade, at which time all initial assignments will be made under the plan on a non-racial basis

Statement

The statement of facts concerning this case has been adequately and completely set forth in the Petition for Certiorari and the several briefs filed by the parties and the United States subsequent thereto. Only a brief summary of the basic facts need be repeated here.

Filed in the district court on January 11, 1958 (R. 2), this suit finally culminated in a judgment directing that the plan of desegregation be placed in operation at the beginning of the September, 1961 Term (R. 47).

Patterned in part after the Alabama pupil placement Act[4], held facially constitutional in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372 (1958), aff'd. 358 U. S. 101, 3 L. Ed. 2d. 145 (1958), the Atlanta Plan became operative as to grades twelve and eleven at the term which began in September, 1961, and has subsequently become operative as to grades ten and nine.

The history of the Atlanta Plan has been one of evolution. Even during its first year of operation, only three of the nineteen criteria (R. 34) originally approved on January 20, 1960 (R. 38), were actually applied.[5] In 1962, the special tests previously given applicants for transfer were discontinued (R. 105, 138), and the only criteria applied were "probability of academic success" and "proximity to the schools requested."[6] In 1963, no factor was used except that of "proximity to the school requested," [7] which resulted in granting of 62% of the applications for transfer.[8]

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[4] Code of Alabama, Recompiled (1958), Title 52, §61 (1)–§61 (12). See also 1 R. R. L. R. 235 (1956) for the original Act, prior to its amendment in 1957.

[5] See letter of the Deputy Superintendent, Brief for Respondent, pp. 6–7.

[6] Brief for Respondents, p. 7.

[7] Id.

[8] Id., p. 6.

The "Motion for Further Relief" filed April 30, 1962 (R. 53), based in large part upon many of the plaintiffs' original objections to the plan (R. 17, 31), was denied by the district court.[1] Upon appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the district court was affirmed (R. 229) with directions (R. 241, 254).

The holding of the Court may be summarized as follows:

(1) The burden of sustaining a plan is on the Board. But where as here this has been done, the burden of later showing it deficient is upon the plaintiffs (R. 234).

(2) "Gradualism in desegregation if not the usual, is at least an accepted mode." (R. 239). Reviewing the results under the plan, the court concludes that a speed-up is not required.

(3) The basic feature of the Atlanta plan, i. e., desegregation by transfer applications, is acceptable so long as the transfer criteria are also applied to new pupils entering the desegregated grades for the first time (otherwise, the criteria would in practice be applied only to Negroes). Also, for the first time, in 1964 the plan will lay hold to the feeder system, when it becomes applicable to the eighth grade, for here the transfer criteria and procedures must be applied system-wide, as seventh grade pupils will be graduating from one school (elementary) to another (high school). This fact will itself greatly dissipate segregation in the higher grades as the eighth grades move up. (R. 241).

(4) The Atlanta system is in a period of transition. The attitude of school officials and their past conduct must be considered. As jurisdiction is reserved, time will tell whether other deficiencies will be found (R. 244).

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[1] R. 156. The opinion is reported as *Calhoun v. Latimer*, 217 F. Supp. 614 (D. C. Ga. 1962).

(5) The Court did not err in postponing consideration of the issue of desegregation as to facilities and staffs (R. 244).

On motion for rehearing, the Court denied same with these directions:

(a) That transfer procedures be applied to students new to a school, with respect to desegregated grades, and to informal transfers.

(b) The requirement that a pupil be equal to or above the median of the school to which transfer is sought can not be used where applied only to Negroes.

(c) The same is true of the interview procedure (R. 258).

ARGUMENT

1. The Plan Constitutes a Valid Method of Transition to a Non-Segregated School System

The remarkable fact about the Atlanta Plan is that not only has it in practice evolved into something quite different from its original intendment, but the decision of the Court of Appeals, while purporting to affirm the judgment below, has so far modified the plan as to remove completely the principal features to which objection is made, thereby rendering moot most of the argument contained in the briefs of petitioners as well as the United States.

The basic argument directed against the plan is that it is merely a pupil transfer plan, that as such it does not constitute a valid start toward desegregation, and that it would be constitutionally relevant only when used with respect to a system or grades already reconstituted on a desegregated basis. In this, the same argument is made as was directed against the Louisiana placement law in *Bush v. Orleans Parish School Board*, 204 F. Supp. 568 (D. C.

La. 1962)[1], an argument which also has prevailed in a number of other cases.[2]

The principal part of the plan relied upon in support of this argument of petitioners is so much thereof as provides:

> "All existing school assignments shall continue without change until or unless transfers are directed or approved by the Superintendent or his duly authorized representative" (R. 34–35).

The inference is then made that the Atlanta Plan is thereby placed in the same category as the "Pupil Transfer Plans" involved in the cases just cited, and hence is defective in that all initial assignments are made on a racial basis, subject to the right of a student to obtain transfer under the placement criteria, under the principle that "Negro children *cannot be required to apply for that to which they are entitled* as a matter of right." *Northcross* v. *Board of Education of Memphis*, 302 F. 2d 818, 823 (C. A. 6th 1962), cert. den. 370 U. S. 944 (1962).

To begin with, we question whether in any event, the Constitution prohibits a state from maintaining the status

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[1] In this case the court declared: "Moreover, where a school system is segregated, there is no constitutional basis whatever for using a pupil placement law. A pupil placement law may only be validly applied in an integrated school system, and then only when no consideration is based on race. To assign children to a segregated school system and then require them to pass muster under a pupil placement law is discrimination in its rawest form." (p. 570).

[2] *Armstrong v. Board of Education of Birmingham*, 323 F. 2d 333 (C. A. 5th 1963); *Davis v. Board of School Commissioners of Mobile County*, 322 F. 2d 356 (C. A. 5th 1963); *Bell v. School Board of Powhatan County*, 321 F. 2d 494 (C. A. 4th 1963); *Mapp v. Board of Education of Chattanooga*, 319 F. 2d 571 (C. A. 6th 1963); *Bradley v. School Board of Richmond*, 317 F. 2d 429 (C. A. 4th 1963); *Flax v. Potts*, 218 F. Supp. 254 (D. C. Texas 1963); *Augustus v. Board of Escambia County*, 306 F. 2d 862 (C. A. 5th 1962); *Green v. School Board of Roanoke*, 304 F. 2d 118 (C. A. 4th 1962); *Northcross v. Board of Education of Memphis*, 302 F. 2d 818 (C. A. 6th 1962); *Jeffers v. Whitley*, 309 F. 2d 621 (C. A. 4th 1932); *Dodson v. School Board of Charlottesville*, 289 F. 2d 439 (C. A. 4th 1961); *Norwood v. Tucker*, 287 F. 2d 798 (C. A. 8th 1961); *Dove v. Parham*, 282 F. 2d 256 (C. A. 8th 1960).

quo so long as reasonable opportunities are afforded pupils to extricate themselves therefrom; for the Constitution does not compel integration, it merely prohibits state-enforced segregation,[3] and segregation can hardly be said to be state-enforced where the state has afforded a ready remedy. Support for this proposition is also found in the fact that the Alabama law, upheld by this Court in *Shuttlesworth*, also envisioned the continuation of existing assignments,[4] yet the court, in upholding the law, declared:

> "The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color." 162 F. Supp. at 384.

In the present case, however, it is not necessary to speculate upon this proposition, as it is not presented here by the facts, assuming for the moment the correctness of the dicta in *Armstrong* v. *Board of Education of Birmingham*, 323 F. 2d 333, 337 (C. A. 5th 1963) to the effect that "The burden of initiating desegregation does not rest on Negro children or parents or on whites, but on the School Board."

The simple fact of the matter is, that the Atlanta Plan does not contemplate the making of initial assignments to schools on racial grounds, with an option to aggrieved pupils

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[3] *Briggs v. Elliott*, 132 F. Supp. 776, 777 (D. C. S. C. 1955); *Thompson v. County School Board of Arlington County*, 144 F. Supp. 239, 240 (D. C. Va. 1956), aff'd. 240 F. 2d 59 (C. A. 4th 1957), cert. den. 353 U. S. 911 (1957); *Kelley v. Board of Education of Nashville*, 270 F. 2d 209, 226 (C. A. 6th 1959); *School Board of Newport News v. Atkins*, 246 F. 2d 325, 327 (C. A. 4th 1957), cert. den. 355 U. S. 855 (1957); *School Board of Charlottesville v. Allen*, 240 F. 2d 59, 62 (C. A. 4th 1956), cert. den. 353 U. S. 910 (1957); *Avery v. Wichita Falls Indep. School District*, 241 F. 2d 230 (C. A. 5th 1957), cert. den. 353 U. S. 938 (1957); *Borders v. Rippy*, 247 F. 2d 268 (C. A. 5th 1957).

[4] Alabama Code, Recompiled (1958), §61 (3).

to transfer out by passing muster under burdensome transfer criteria. Under the Atlanta Plan, the situation can best be summarized as follows:

> (1) With respect to pupils already in a given school, their assignments do remain fixed there, subject to freely given transfers based upon the criteria of choice, space and proximity. The same criteria, under the decision of the Court of Appeals below, will hereafter be applied to all transfers, "formal" or "informal" (R. 241).
>
> (2) With respect to pupils coming into a school for the first time and entering a grade already reached by the Plan, initial assignment criteria of choice, space and proximity will be applied to all such pupils, regardless of race (R. 241; Brief of Respondents in Opposition, pp. 10–11).
>
> (3) In September 1964, when the plan reaches the Eighth Grade, in which pupils have graduated from one school to another, the "feeder system" can no longer be used, but pupils must be assigned according to the assignment criteria—choice, space and proximity, a fact which will greatly accelerate the progress of the desegration. The same procedure will be followed on initial assignments to the first grade when the plan reaches that grade in 1971 (R. 241).

The features which distinguish the Atlanta Plan from those condemned in the collection of cases hereinbefore cited (Footnote 2, supra) are the non-racial assignment of pupils new to a school, whether with respect to a pupil moving into the Atlanta system from elsewhere and entering a grade already reached by the plan, or whether with respect to pupils entering either the Eighth Grade or the First Grade. As stated by the Court of Appeals below:

> "The main thrust or force of its application will be in the admission and assignment from elementary to high schools, and to the first grade. This means that

> for the school term beginning in September 1964, the plan will lay hold of the feeder system for the first time. This follows from the fact that such factors as are used for assignment and transfer must be used system wide in the assignment and transfer of seventh grade students to the eighth grade since they will be moving from one school to another, elementary to high school. This will remove even the residuum of the dual system from this grade, and will rapidly dissipate from the other high school grades as other succeeding elementary grades reach the eighth grade. The dual system will be entirely eliminated when the plan reaches the first grade." *Calhoun* v. *Latimer*, 321 F. 2d 302, 310 (C. A. 5th 1963).

This is identically the same type plan devised by the Court of Appeals in *Armstrong* (323 F. 2d 333) and *Davis* v. *Board of School Commissioners of Mobile County*, 322 F. 2d 356 (C. A. 5th 1963).

The only feature left in the plan which plaintiffs conceivably could attack is so much thereof as preserves the assignments of pupils already attending a school. But this contention has already received all the answer it requires in another well-considered opinion, *Monroe* v. *Board of Commissioners of Jackson, Tennessee*, 221 F. Supp. 968 (D. C. Tenn. 1963), where a similar provision allowing pupils to remain in the school they were then attending was upheld, declaring:

> "This good reason is the obvious advantage of a continuation in familiar surroundings with the same teachers and fellow students. This provision will, of course, expire by its own terms in a relatively few years."

Where children are already enrolled in a given school, in most instances they have become settled, and to arbitrarily reassign everyone would needlessly disrupt existing re-

lationships. This consideration has real meaning for school administrators. The most crucial issue in public education in Georgia today is not desegration, but consolidation of schools and reassignment of pupils in such a manner as to achieve a balance in pupil-teacher loads. Hardly a month goes by that the State Board of Education is not beset with bitterly contested appeals involving consolidation of schools and reassignment of pupils. Even stripped of any racial involvements, these disputes almost always generate strife. Conceding that delay is not to be countenanced simply because of hostility to the supreme law, it goes without saying that education can not survive in an atmosphere of acrimonious confusion. As stated recently:

> "In testing the plan submitted we should remind ourselves of a fact seemingly often overlooked by those who are anxious for rapid social change, this being that the chief function and primary concern of the Board of Education is not the preservation of the status quo in race relations, nor is it the advancement of social revolution. The Board's primary duty is to provide good educational facilities and operate them in an orderly manner and in an atmosphere free from turmoil and tension. While it is this Court's duty to order an end to the segregated system, which we have done, we deem it no less proper that we accord to the local school authorities superior knowledge with respect to the mechanics of a plan and the timing of its effectiveness." *Gaines* v. *Dougherty County Board of Education*, 222 F. Supp. 166, 170 (D. C. Ga. 1963).

What we are here saying is that a wholesale reassignment of pupils in any school system will produce resentment, confusion and chaos quite apart from racial entanglements. Atlanta, like other school systems in Georgia, is dependent

upon public support for the financing of needed school buildings.[5]

Certainly, it is no valid objection that the plan begins in the twelfth grade and proceeds downward. In upholding a plan substantially identical to that of Atlanta, Judge West declared in *Davis* v. *East Baton Rouge Parish School Board*, 219 F. Supp. 876, 883 (D. C. La. 1963):

> "Plaintiffs object to the plan of desegregation commencing at the twelfth grade level rather than at the first grade level. No valid reason was, or could be, advanced by the plaintiffs in support of this objection. In the process of desegrating schools throughout the country, many different plans have been successfully employed. Some areas have preferred to commence desegration at the first grade level, while others, with equal or perhaps even greater success, have commenced at the twelfth grade level. Among the cities employing the latter plan are: Little Rock, Arkansas; Pulaski, Kentucky; Harlan, Kentucky; Taylor, Kentucky; Atlanta, Georgia; Anderson County, Tennessee; Norfolk, Virginia; Hot Springs, Arkansas; Cumberland, Kentucky; Spencer, Kentucky; Donville, Kentucky; Dorchester, Maryland; Wilson County, Tennessee, and Warren County, Virginia."

The provision retaining intact all existing assignments, subject to right of transfer, is certainly sustainable as an interim measure. *Dodson* v. *School Board of Charlottesville*, 289 F. 2d 439, 444 (C. A. 4th 1961); *Hill* v. *School Board of Norfolk*, 282 F. 2d 473 (C. A. 4th 1960). Nor should Atlanta be penalized for failing to move forward at a time when it was faced with laws, the legality of which was not then determined, which threatened a cut-off of funds in the event of

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[5] Georgia Constitution, Art. VII, Sec. VII, requires approval of voters before indebtedness can be incurred by any political subdivision.

desegregation. *Jones* v. *School Board of Alexandria*, 278 F. 2d 72, 75 (C. A. 4th 1960).

The desegregation process may be achieved in a number of ways. One obvious method is a wholesale reassignment of all pupils on a geographical basis as plaintiffs would have. According to our understanding, this harsh course was not even followed in toto in the District of Columbia. See 2 R. R. L. R. 210, 211 (1957), Or, a school system might adopt a zone system, effectuating the same on a grade-a-year basis, beginning with the lower grades and going up, as was done in Nashville. See *Kelley* v. *Board of Education of Nashville*, 270 F. 2d 209 (C. A. 6th 1959), cert. den. 361 U. S. 924 (1959), or a system might, on a grade-a-year basis, give pupils the choice of attending the formerly white or formerly colored schools nearest their homes, as has been done in Houston, see *Houston Indep. School District* v. *Ross*, 282 F. 2d 95 (C. A. 5th 1960); 5 R. R. L. R. 709, and in New Orleans, see *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (C. A. 5th 1962), and in Obion County, Tennessee, see *Vick* v. *County Board of Education of Obion County*, 205 F. Supp. 436 (D. C. Tenn. 1962). Or, a system might give every child the option of choosing the school that he will attend anywhere in the system, as we understand is now the case in Little Rock, and is substantially the plan in effect in Louisville, Kentucky, see Carmichael, *The Louisville Story*, p. 84 (1957), as well as in New Rochelle, New York, see *Taylor* v. *Board of Education of New Rochelle*, 195 F. Supp. 231 (D. C. N. Y. 1961), aff'd. 294 F. 2d 36 (C. A. 2nd 1961), cert. den. 368 U. S. 940 (1961). Likewise, a system might do as Atlanta has done, for as said in *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491, 503 (C. A. 5th 1962):

> "We observe again that desegration procedures, within reasonable limits, must be flexible in order to

> fit local needs and new situations as they arise and present problems. Here, as in Augustus v. Board of Public Instruction of Escambia County, 5 Cir., 1962, 306 F. 2d 862, we say that the primary responsibility for judicial supervision lies with the district court. It is the tribunal best qualified to wrestle with specifics. 'We are reluctant to substitute our judgment for that of the district court . . .'"

2. The Court Below Did Not Err in Refusing To Speed Up The Process of Desegregation or in Postponing Reassignment of Faculty and Other Personnel

Little can be added to what has been well-presented in the brief of respondents. We should emphasize, however, as did the Court of Appeals below (R. 241) that the process of desegregation will automatically be speeded up at the beginning of the 1964–65 Term, when all pupils entering the high schools (eighth grade) will be initially assigned on a non-racial basis, a step which will be reflected in all subsequent years thereafter. Another acceleration will take place in 1971 when the plan reaches the first grade. In the meantime, due to the Atlanta Plan's having started at the higher grades and proceeding downward, the students in the higher grades will have had the opportunity of obtaining transfers under the liberal procedures now in effect.

Secondly, with respect to reassignment of faculties and other school personnel, it is a most fundamental proposition that a litigant lacks standing to assert the constitutional rights of another. *McCabe* v. *Atchison Topeka & Santa Fe Railway Co.*, 235 U. S. 151, 162; 59 L. Ed. 169 (1914). This proposition was recognized in the leading case dealing with the present contention, *Augustus* v. *Board of Public Instruction of Escambia County*, 306 F2d 862, 868 (C. A. 5th 1962), where the Court of Appeals held (1) That in view of the allegation in the complaint that this practice "injured plain-

tiffs," the court should not resolve the issue on motion to strike, but should await the development of evidence, and (2) That this evidence need not be considered at once, but could be postponed pending completion on further progress in the desegregation of the pupils. To begin with, there is no clear-cut allegation of injury in the complaint in this case as was contained in the complaint in the Escambia case (R. 4–5). Moreover, unlike *Escambia*, this case has been tried on the merits, and plaintiffs have not produced any evidence showing injury. The basis of this Court's decision in the first *Brown* case[6] was a finding of injury based upon evidentiary consideration. See *Taylor* v. *Board of New Rochelle*, 191 F. Supp. 181, 192 (D. C. N. Y. 1961). At this stage, no court can determine whether the practice does cause injury, and for that reason, the matter should be held in abeyance, as was done in the *Escambia County* case. Of course, where in any case such a finding is made, a different question is presented. *Board of Public Instruction of Duval County* v. *Braxton*, 326 F2d 616 (C. A. 5th 1964). See also, in accord with the principle of holding this question in abeyance, but declaring that in any event pupils can not attack assignments of school personnel other than teachers and principals, *Mapp* v. *Board of Education of Chattanooga*, 319 F2d 571 (C. A. 6th 1963).

CONCLUSION

The first of the two most significant steps in the Atlanta Plan will take place in September 1964. Because the primary responsibility in this field is on the Board and the local courts, *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, 299, 99 L. Ed. 1083 (1955), all of whom have acted forthrightly in the premises, and because the courts below are better able to draw inferences and appraise the situa-

[6] *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1959).

tion, *Wright* v. *Rockefeller*, ... U. S. ..., 11 L. Ed. 2d 512 (1964), the plan should be permitted to run its course. The judgment below should be affirmed.

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